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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Independent School District No. 196,
Rosemount-Apple Valley, Minnesota,
et al.,

Petitioners,

vs.

Lynne E. Cybyske,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the Minnesota Supreme Court erred in holding, contrary to Singleton v. Wulff and its progeny, that Respondent Lynne Cybyske had standing to assert a violation of the associational freedom of her non-party spouse.

2. Whether Respondent's First Amendment freedom of association includes, vicariously, the political beliefs and associations of her non-party spouse.

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vs.

Lynne E. Cybyske,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioners respectfully request the Supreme Court of the United States to issue a Writ of Certiorari to review the judgment and opinion of the Minnesota

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*The other parties to this case are Petitioners Lee Droegemueller, individually and as Superintendent of Independent School District No. 196, Ruth Randall, individually and as

Supreme Court entered and filed in this proceeding on April 6, 1984.

OPINIONS BELOW

The Opinion of the Minnesota Supreme Court, reported at 347 N.W.2d 256, appears in Appendix A. The Order and Memorandum of the Dakota County District Court (the court of original jurisdiction), which is unreported, appears in Appendix B.

Director of Personnel of Independent School District No. 196, and Robert Keeton, individually and as Director of Elementary Education of Independent School District No. 196.

Independent School District No. 196 is a public corporation as defined by section 122.02 of Minnesota Statutes. Having been created by the Minnesota Legislature, it is a political subdivision of the state and it has no parent, subsidiary or affiliate corporations.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered and filed on April 6, 1984. Petitioners' Application for an Extension of Time within which to file a Petition for a Writ of Certiorari was granted by an Order signed by Justice Blackmun dated June 25, 1984, which gave Petitioners until and including September 3, 1984 to file this Petition. This Petition was filed by that date.

The judgment of the Minnesota Supreme Court having become final, United States Supreme Court jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Sections 1 and 5 of the Fourteenth Amendment to the Constitution of the United States provide:

> Section 1. . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title 42, section 1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or

> usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Respondent Lynne E. Cybyske initiated this civil action against Petitioners in the Dakota County District Court (trial court of original jurisdiction) during June of 1981. Respondent claimed that Petitioners had infringed upon her First Amendment right to freedom of association under the United

States Constitution. Respondent also claimed that Petitioners had violated state discrimination laws, that she had been deprived of her right to freedom of choice in marriage in violation of the Fourteenth Amendment to the United States Constitution, and that Petitioners had engaged in a civil conspiracy to deprive Respondent of her civil rights. In her prayer for relief, Respondent sought compensatory damages, punitive damages, attorneys' fees and an injunction to order the school district to hire her as a public school teacher.

Only the freedom of association

claim remains at issue in this proceeding, the Minnesota Supreme Court having dismissed Respondent's state and other federal constitutional claims. As to that freedom of association claim, Respondent's complaint alleged that the "actions of defendants in refusing to hire Ms. Cybyske because of her relationship to her husband infringe on her right to freedom of association in violation of the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983." (Complaint ¶ 24.)

Respondent had been employed by Petitioner Independent School District No. 196 as a teacher during the

1979-1980 school year. At that time she was employed as a substitute to replace another teacher who was on a leave of absence. Her employment expired at the end of that school year.

After her employment expired, a vacancy arose in Independent School District No. 196 for another teaching position for the 1980-1981 school year. Respondent applied and was interviewed for that position along with several other applicants. Someone else was hired for that position.

During the 1979-1980 and 1980-1981 school years, Respondent was married to Daniel Cybyske. Daniel Cybyske was a member of the school board (the

elected governing body of a school district) in a neighboring school district. He had been elected to that position in May of 1979. Respondent alleged that her husband had "pro-teacher" political views, and that she was not hired because of her husband's views. Daniel Cybyske is not and has never been a party to this action.

After extensive discovery, Petitioners brought a motion in the trial court for summary judgment or dismissal of all of Respondent's claims pursuant to Minn. R. Civ. P. 12 and 56. Petitioners alleged, inter alia, that Respondent was seeking to remedy the alleged violations of her non-party spouse's associational freedoms and had

no standing to do so. Thereafter, Respondent brought a motion to amend her complaint to add Daniel Cybyske as a named plaintiff in the action.

On February 25, 1983, the Honorable George H. Hoey, Judge of District Court, issued his Findings and Order (reprinted in Appendix B). Judge Hoey dismissed Respondent's complaint and he denied Respondent's motion to amend her complaint.

Respondent then appealed the trial court's decision to the Minnesota Supreme Court. By its decision of April 6, 1984 (reprinted in Appendix A), the Minnesota Supreme Court affirmed the trial court on all issues and claims except one. The one exception was the

Minnesota Supreme Court's reversal on the issue of infringement of Respondent's First Amendment right to freedom of association under the United States Constitution. In its opinion the Minnesota Supreme Court concluded that there may have been an infringement upon Respondent's right to freedom of association due to Daniel Cybyske's political views. See 347 N.W.2d at 262; Appendix at A-26 to -27.

The Minnesota Supreme Court first recognized that Respondent's associational freedom extended to her right to associate with her husband who was exercising his First Amendment right to free speech:

If the failure to hire Lynne was indeed based on her husband's membership and known opinions as a member of a neighboring school board, Lynne Cybyske's associational freedoms were thereby compromised. "The Constitution affords * * * a right of association with other persons for a variety of purposes." Sullivan, supra, 530 F.2d at 804 (citations omitted). Surely, the right to associate with another person for the purpose of marriage is a basic right. Where the public employer discriminates against a job applicant because the employer dislikes the activities of the applicant's spouse, particularly where that spouse is only exercising his or her first amendment rights in the performance of public service as a school board member, it would seem that the job applicant's associational freedoms have been impaired. Cf. Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966) (loss of public employment for membership in Communist party violates freedom of political association).

347 N.W.2d at 262; Appendix at A-25 to -27. Nowhere in its opinion did the Minnesota court intimate that Respondent was exercising her right to express or advance political views. Only Daniel Cybyske was exercising the right to speak on matters of public interest.

The Minnesota Supreme Court was careful to point out that Respondent had not been denied her right to marry:

> In this case, the defendants' refusal to hire Lynne Cybyske did not deny her the right to marry; it did, however, allegedly discriminate against her because of her particular choice of marital partner.

347 N.W.2d at 263; Appendix at A-29. The court then went on to expand

freedom of association to encompass a First Amendment "rights-in-marriage" claim:

> What plaintiff is really seeking is a "rights-in-marriage" constitutional claim. We see no need, the federal constitutional law being as undeveloped as it is, to establish, at least in this case, a new rights-in-marriage claim, and we decline to do so. To the extent there might be any such claim we think it is already merged in the constitutional freedom of association claim which we have here recognized.

347 N.W.2d at 263; Appendix at A-30 to -31.

Finally, the court concluded that Respondent had asserted a freedom of association claim based on her allegation that she was not hired to be a public school teacher as a consequence of Daniel Cybyske's political views:

> Plaintiff-appellant has made a sufficient showing that a genuine factual dispute exists as to whether her husband's activities were a "substantial" or "motivating" factor in her nonhiring by the school board, and at this stage of the proceedings there also appears to be a factual dispute as to whether the school district would not have hired plaintiff even in the absence of her husband's activities. See Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977). We hold, therefore, that the trial court erred in granting summary judgment on plaintiff's section 1983 claim for deprivation of her constitutional right of freedom of association.

347 N.W.2d at 263; Appendix at A-31 to -32.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the potential liability of a state political sub-

division for violating a prospective teacher's First Amendment right to freedom of association. By holding that Respondent had standing to raise a claim based on her husband's right to freedom of association, the Minnesota Supreme Court's decision conflicts with the United States Supreme Court's doctrine of standing. See Singleton v. Wulff, 428 U.S. 106, 113-14 (1976).

In this case Respondent has not alleged any interference with "her" right to associate with others, including her husband, for the advancement of beliefs or ideas. She has claimed no interference with her own right to express pro-teacher or pro-union views, nor has she alleged any

discrimination or interference relating to her activity with any teacher organization or union. Rather, she claims a violation of freedom of association based on the allegation that Petitioners deprived her of employment because of her husband's political views. Precedent established by the United State Supreme Court and other federal courts does not give Respondent standing to allege violations of her non-party spouse's constitutional rights. See Singleton v. Wulff, 428 U.S. at 113-14. The holding of the Minnesota Supreme Court expands Respondent's right to freedom of association to create new constitutional "rights-in-marriage" that do not exist.

Even assuming for purposes of argument that such a claim does exist, the grant of standing to sue for vindication of a non-party spouse's rights is in clear conflict with Singleton v. Wulff. Also, assuming for purposes of argument that Respondent in fact was not hired because of the political views and associations of her husband, the questions become, first whether Respondent has standing to raise her non-party spouse's constitutional claims, and second, whether the decision not to hire Respondent because of her husband's political views and associations can constitute a deprivation of "her" freedom of association.

The United States Supreme Court has

long recognized the right of "freedom to engage in association for the advancement of beliefs and ideas," and that this right will apply "whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." NAACP v. Alabama, 357 U.S. 449, 460 (1958); accord, Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 555 (1963) (right protects "free trade in ideas and beliefs"); Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) ("it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected"); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("every citizen

shall have the right to engage in political expression and association"); see NAACP v. Alabama, 377 U.S. 288, 307 (1964); NAACP v. Button, 371 U.S. 415, 430 (1963); Shelton v. Tucker, 364 U.S. 479, 486 (1960).

But in this case Respondent has not even alleged that she associates with her husband for the advancement of any belief or idea. Rather, it is her husband, a non-party, who seeks to advance beliefs and ideas. Because Respondent has not alleged that "she" has been deprived of a right to associate for the advancement of a belief or idea, Respondent has no claim for violation of "her" freedom of association under the Constitution.

Perhaps Respondent views the marriage relationship itself as being a sufficient associational interest. But she has not alleged that this relationship has as its purpose the advancement of any belief or idea, nor has the United States Supreme Court recognized the marriage relationship for the purpose of freedom of association.

It is true, as the Minnesota Supreme Court recognized below, that Respondent does have a constitutional right to marry. But she has not been deprived of that right, and that right is no longer at issue in this proceeding. 347 N.W.2d at 263; Appendix at A-29.

In essence, Respondent is invoking her husband's right to freedom of association as her own. But the rules of standing do not permit Respondent to attempt to vindicate another person's constitutional rights in this proceeding.

As the Court observed in Singleton v. Wulff, 428 U.S. 106 (1976):

> Federal courts must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation. The reasons are two. First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. See Ashwander v. TVA, 297 U.S. 288, 345-348, 56 S.Ct. 466, 482-83,

80 L.Ed. 688 (1936) (Brandeis, J., concurring) (offering the standing requirement as one means by which courts avoid unnecessary constitutional adjudications). Second, third parties themselves usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. The holders of the rights may have a like preference, to the extent they will be bound by the courts' decisions under the doctrine of stare decisis. See, e.g., Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962) (standing requirement aimed at "assur[ing] that concrete adverseness which sharpens the presentation of [the] issues upon which the court so largely depends"); Holden v. Hardy, 169 U.S. 366, 397, 18 S.Ct. 383, 390, 42 L.Ed. 780 (1898) (assertion of third parties' rights would come with "greater cogency" from the third parties themselves). These two considerations underlie the Court's general rule: "Ordinarily, one may not claim standing in this Court to vin-

> dicate the constitutional rights of some third party." Barrows v. Jackson, 346 U.S. at 255, 73 S.Ct. at 1034. See also Flast v. Cohen, 392 U.S. at 99 n. 20, 88 S.Ct. at 1952; McGowan v. Maryland, 366 U.S. 420, 429, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393 (1961).

Id. at 113-14 (plurality opinion); cf. id. at 122-31 (four Justices, dissenting in part, adopting a more narrow view of standing).

Under this rule, Respondent lacks standing to assert her husband's constitutional rights. For this reason the Minnesota Supreme Court erred in finding that Respondent could assert a freedom of association claim based upon her husband's associational interests. See Sherer v. Waier, 457 F. Supp. 1039, 1047 (W.D. Mo. 1978) (mother lacks standing

to assert deprivation of daughter's rights).

Respondent's husband, Daniel Cybyske, could have chosen to be a party plaintiff at the inception of this litigation. But he apparently chose not to do so, and nothing prevented him from joining in the litigation at that time. Because he is not a party his right to freedom of association should not be adjudicated through the claims of a third person.

The Minnesota Supreme Court erred in permitting Respondent to maintain a freedom of association claim based on the allegation that she was not hired as a result of her husband's political views. Because Respondent has not

alleged that she is being deprived of the right to associate with others for the advancement of ideas or beliefs, she has no claim for violation of her First Amendment rights.

The result of the Minnesota Supreme Court's decision is that every time a person is denied employment, that person can bring a constitutional claim based on the identity, occupation or political views of his or her spouse. This goes far beyond the reach of either the constitutional right to freedom of association or the right to freedom of choice in marriage.

CONCLUSION

Based upon the foregoing, the Petition for a Writ of Certiorari should be granted.

August 31, 1984

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

C9-83-593

Dakota County

Simonett, J.
Dissenting in part and concurring in part, Wahl & Yetka, JJ.

Lynne E. Cybyske,

Appellant,

vs.

Independent School District No. 196, Rosemount-Apple Valley, Minnesota, et al.,

Respondents.

Endorsed
Filed April 6, 1984
Wayne Tschimperle
Clerk of
Appellate Courts

S Y L L A B U S

1. A person who is not hired for a teaching position because of the pro-teacher views of her husband, a member of a neighboring school board, does not have a claim for marital status discrimination under the Minnesota Human

Rights Act. She has, however, made a showing of a cause of action under 42 U.S.C. § 1983 for deprivation of her constitutional right of freedom of association sufficient to defeat a summary judgment motion.

2. The trial court did not err in disallowing plaintiff's motion to amend her complaint.

Affirmed in part and reversed in part.

Considered and decided by the court en banc without oral argument.

O P I N I O N

SIMONETT, Justice.

The plaintiff teacher claims she was not hired by the defendant school district because of "martial status" discrimination and in violation of her

constitutional rights. The trial court granted summary judgment to the school district. We reverse dismissal of the constitutional claim for deprivation of the right to freedom of association but otherwise affirm.

Plaintiff-appellant Lynne E. Cybyske was hired by defendant-respondent Independent School District No. 196 (Rosemount-Apple Valley) as a long-term substitute teacher for the 1979-80 school year, teaching art and fifth grade at the Westview Elementary School. When this job expired in June of 1980, Lynne applied for another teaching position that was open in the Rosemount-Apple-Valley system, and had an apparently favorable initial interview for the position of fifth grade

teacher at the Diamond Path Elementary School. Lynne, however, did not get the job. Instead, the school district hired another woman for the position, allegedly on the grounds the other applicant had a stronger background in art and appeared to be more student-oriented.

Lynne then sued the school district. She claimed that the reason she was not hired was because she was married to Daniel Cybyske, and that the school district did not like her husband's "pro-teacher" views. In the spring of 1979, before Lynne had been hired for the substitute teaching position, her husband Daniel had been elected a member of the school board of the neighboring Burnsville School District. Apparently Daniel had been

elected with strong teacher support in the Burnsville district and, as a school board member, became a vocal, controversial advocate for "a bigger voice" for teachers in school district decision-making. While a school board member, Daniel was paid by the Minnesota Education Association to conduct two seminars for teachers on how to elect pro-teacher candidates to school boards.

Plaintiff Lynne Cybyske's complaint against the Rosemount-Apple Valley School District and three of its administrators alleged discrimination on the basis of marital status in violation of the Minnesota Human Rights Act, Minn. Stat. §§ 363.01-.14 (1982). She also alleged that the discrimination infringed on her rights to freedom of

association and freedom of choice in her marital relationship, in violation of 42 U.S.C. § 1983 and the first and fourteenth amendments to the Federal Constitution. Extensive discovery followed the filing of the complaint. In November 1982, the trial court heard defendants' motion for summary judgment. At that time Lynne moved to amend her complaint to add her husband Daniel as an additional party plaintiff to include his claim for violation of his first amendment right to free speech. The trial court denied this motion to amend, and it granted the summary judgment motion. This appeal follows.

The trial court granted summary judgment on the grounds that there were no genuine issues of material fact and

that plaintiff's complaint had "failed to allege actionable marital status discrimination under either State or Federal law." Clearly, there was a genuine factual dispute as to whether plaintiff had not been hired because her husband entertained political views at odds with the employer school district. Consequently, the issues presented here are: Assuming plaintiff's version of the facts is correct, does refusal of a school district to hire a teacher because of her husband's pro-teacher attitudues constitute marital status discrimination under the Minnesota Human Rights Act? Secondly, does such refusal violate plaintiff's martial rights or freedom of speech and association under the Federal Constitution? Other issues

raised by plaintiff-appellant are whether summary judgment was premature and whether it was error to deny amendment of her complaint to include the husband's claim.

I.

We consider first plaintiff's claim under our Human Rights Act. Minn. Stat. § 363.03, subd. 1 (1982), reads in part:

> Except when based on a bona fide occupational qualification, it is an unfair employment practice:
>
> * * *
>
> (2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, or age,
>
> (a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

* * *

> (c) to discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

(Emphasis added.)

While "marital status" is not a protected class under Title VII,[1] it is included in many state human rights acts. Some states have construed the term narrowly, holding that it refers to the status of the job applicant, namely, whether that person is single, married, separated, divorced, or widowed.[2] Thus refusal to hire a person because that person is married would be unlawful

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[1]Federal Civil Rights Act of 1964, tit. VII, § 701, Pub. L. No. 88-352, 78 Stat. 241, 253-55 (codified as amended, 42 U.S.C. § 2000(e) (1976)).

[2]E.g., Prince George's County v. Greenbelt Homes, Inc., 40 Md. App. 314, 431 A.2d 745 (1981) (refusal to permit unmarried couple to live in a coopera-

discrimination. Other states have construed the term "marital status" more

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tive housing development was not marital status discrimination); Thomson v. Sanborn's Motor Express, Inc., 154 N.J. Super. 555, 381 A.2d 53 (App. Div. 1977) (employer's anti-nepotism rule was not marital status discrimination); In re Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board, 51 N.Y.2d 506, 415 N.E.2d 950, 434 N.Y.S.2d 961 (1980) (anti-nepotism rule was not marital status discrimination).

broadly, holding that it also encompasses the identity or situation of the job applicant's spouse.[3] Under this view, an employer may not discriminate because of who the applicant's spouse is or what that spouse does. This court adopted a broad construction of marital status in Kraft, Inc. v. State, 284 N.W.2d 386 (Minn. 1979). There we held that a company rule prohibiting the full-time hiring of more than one member of an immediate family was unlawful marital status discrimination under our

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[3] E.g., Thompson v. Board of Trustees, ___ Mont. ___, 627 P.2d 1229 (1981) (anti-nepotism rule invalid); Washington Water Power Co. v. Washington State Human Rights Commission, 91 Wash.2d 62, 586 P.2d 1149 (1978).

Human Rights Act. We acknowledged we were giving a broad interpretation to marital status, stating:

> We reject the view that "marital status," while it denotes the fact that one is or is not married, does not embrace the identity or situation of one's spouse. Since respondent does employ married, single and divorced individuals, to hold otherwise would condone discrimination against a portion of a protected class, i.e., job applicants already married to full-time Kraft employees. [Citations omitted.] To do so would ignore the broad prohibition against arbitrary classifications embodied in the Human Rights Act and would elevate form over substance.

248 N.W.2d at 383 (emphasis added).

In Kraft, we held, absent a bona fide occupation qualification, that the employer could not discriminate against a job applicant because of what his or her spouse was doing--which in Kraft

was working full time for the same employer. The question in this case is whether that holding should be extended to prohibit discrimination against the plaintiff job applicant because of what her spouse was doing, namely, advocating "disloyal" pro-teacher views while a board member of another school district.

In other words, is it "marital status" discrimination under our Act to retaliate against one spouse because of the political views or associations of the other spouse? The school district answers no, relying on State Division of Human Rights ex rel. Howarth v. Village of Spencerport, 78 A.D.2d 50, 434 N.Y.S.2d 52 (1980). There the mayor fired his secretary because of public dissatisfaction with the secretary's

husband, the tax assessor, who had made unpopular tax assessments. The lower New York Appellate Court pointed out that it was just as likely the secretary would have been fired if the tax assessor had been her father, brother, or other relative. In other words, the New York court reasoned the plaintiff's claim did not arise from marital status but from political retaliation. It should be noted, however, that New York is committed to the narrow view of the term marital status as referring only to the condition of the employee being married. In re Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board, 51 N.Y.2d 506, 415 N.E.2d 950, 434 N.Y.S.2d 961 (1980) (upholding an anti-nepotism rule).

In Kraft we said that marital status includes the "identity or situation" of one's spouse. We did not, however, elaborate on what was meant by "identity or situation." Human nature being what it is, people have their likes and dislikes. An employer may dislike an employee's spouse for a variety of reasons, but it seems unlikely the legislature intended any kind of disliking to give rise always to a

discrimination lawsuit.[4] It is significant, for example, that section 363.03,

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[4] In Marital Status Discrimination: An Amorphous Prohibition, 54 Fla. B.J. 217 (1980), the author, John-Edward Alley, lists six areas where at least some courts have indicated a willingness to find marital status discrimination by employers: (a) where employees are required to be either single or married; (2) anti-nepotism rules; (3) refusal to hire unwed mothers; (4) refusal to hire women with dependents while hiring men with dependents; (5) the hiring of married couples only; and (6) requiring female employees to change their last names upon marriage.

We have found no case extending marital status discrimination to employees in a political retaliation setting.

subd. 1, does not prohibit discrimination on the basis of political beliefs or status, although it does proscribe discrimination for creed or religion.[5]

If the question before us is whether the "political status" of one's spouse is protected under our Human Rights Act, the answer is no. Plaintiff-appellant seeks to evade this result by rephrasing the question. She

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[5]Minn. Stat. § 363.03, subd. 1(2) (1982), also prohibits employment discrimination for "membership or activity in a local commission." "Local commission," however, is narrowly defined by statute to include only those agencies "created * * * for the purpose of dealing with discrimination * * *," Minn. Stat. § 363.01, subd. 24 (1982). It does not include membership on a neighboring school board.

argues that she did not get the teaching job simply because she was married to Daniel Cybyske; that the discrimination lies not in the unpopularity of her husband with the defendant school district but in the fact that her husband's "identity" or "situation" is imputed to her. Since this imputation is based solely on the marriage relationship itself, there is marital status discrimination under the Act.

We can concede the plausibility of plaintiff's argument, but it proves too much. To adopt plaintiff's argument would mean that any employer bias of predilecton towards a spouse which is imputed to the employee, whether or substance or not, would subject the employer to a lawsuit. We do not think

the legislature had this in mind.

Nor do we think Kraft holds differently. Kraft quite properly struck down an anti-nepotism rule as marital status discrimination. The company rule provided that a person would not be hired where the applicant's spouse was already an employee. An anti-nepotism rule is just another way of saying that an employer refuses to hire a married couple. Put this way, the rule is a direct attack on the husband and wife as an entity and is contrary to the "legislative judgment [that] reflects the protected status the institution of marriage enjoys in our society." Kraft, 284 N.W.2d at 388. Also, in Kraft, we said for the employer to employ others who were married, single, or divorced

but not those married to a spouse already employed by the company, was an arbitrary classification. In our case here, however, no distinct invidious classification emerges.

We adhere to our broad construction of marital status as enunciated in Kraft; i.e., in determining whether marital status discrimination exists, the identity and situation of the spouse is an important factor. We apply this approach, however, in the context of construing a statute to effectuate legislative intent. The legislature did not intend to proscribe a particular political posture, whether of an employee or of the employee's spouse, in the Human Rights Act. Nor do we think the term marital status should be

construed to include what the legislature excluded. Here the alleged immediate reason for the discrimination is not directed at the institution of marriage itself, at least not with the same directness and closeness as in Kraft. We hold, therefore, that plaintiff Lynne Cybyske does not have a cause of action for marital status discrimination under our Human Rights Act.

II.

The next issue is whether appellant Lynne Cybyske has a cause of action under 42 U.S.C. § 1983 against the defendant school district and its administrators for infringement of her right to freedom of choice in marriage and to freedom of association under the first and fourteenth amendments to the Federal

Constitution. We hold that plaintiff-appellant has, in the current posture of this case, established a constitutional claim sufficient to defeat defendants' motion for summary judgment.

While Lynne Cybyske's nonhiring was not based on any set rule or regulation, and though she had no property right to be hired by the school district, she may prevail if she can establish that the decision of the public employer not to hire her was made because of her exercise of constitutionally protected rights and freedoms. See Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Burris v. Willis Independent School District, Inc., 713 F.2d 1087 (5th Cir. 1983) (both cases involving nonrenewal of the

contracts of untenured teachers).

The alleged deprivations in this case were to Lynne Cybyske's freedom of association and freedom of choice in marriage under the first and fourteenth amendments. These claims are in some respects similar to the claims in Sullivan v. Meade Independent School District No. 101, 530 F.2d 799 (8th Cir. 1976). There a teacher was discharged midterm as incompetent to continue teaching because she insisted on cohabitating with a single man. The trial court dismissed her section 1983 action and, on appeal, the eighth circuit affirmed. The appellate court, however, acknowledged probable infringement of the teacher's rights of privacy and association, but at the same time

recognized the state's vital concern in maintaining "a properly moral scholastic environment." 530 F.2d at 804, quoting Andrews v. Drew Municipal Separate School District, 507 F.2d 611, 614 (5th Cir. 1975), cert. dismissed, 425 U.S. 559 (1976). The eighth circuit explained that the teacher's rights were not absolute and when they conflicted with the state's legitimate concerns, "a balance must be struck." Id. at 804, citing Pickering v. Board of Education, 391 U.S. 563 (1968). The court, however, did not attempt to strike the balance; instead, it found a "good faith" exception to section 1983 liability of the school board under Wood v. Strickland, 420 U.S. 308 (1975). The "good faith" exception applied in

Sullivan was further explained and limited by the United States Supreme Court in Owen v. City of Independence, 445 U.S. 622 (1980), where it was held that a municipality could not assert the good faith of its officers as a defense where neither policy nor tradition at the time of the enactment of section 1983 justified such immunity. See also Trotman v. Board of Trustees of Lincoln University, 635 F.2d 216 (3d Cir. 1980), cert. denied, 451 U.S. 986 (1981).

If the Sullivan dictum has merit, it would seem that Lynne Cybyske could have an enforceable action against the school district, even assuming a good faith exception might exist to shield the district administrators. If the failure to hire Lynne was indeed based on her

husband's membership and known opinions as a member of a neighboring school board, Lynne Cybyske's associational freedoms were thereby compromised. "The Constitution affords * * * a right of association with other persons for a variety of purposes." Sullivan, supra, 530 F.2d at 804 (citations omitted). Surely, the right to associate with another person for the purpose of marriage is a basic right. Where the public employer discriminates against a job applicant because the employer dislikes the activities of the applicant's spouse, particularly where that spouse is only exercising his or her first amendment rights in the performance of public service as a school board member, it would seem that the job

applicant's associational freedoms have been impaired. Cf. Elfbrandt v. Russell, 384 U.S. 11 (1966) (loss of public employment for membership in Communist party violates freedom of political association). To avoid "guilt by association," the association would have to be disavowed. If the nonhiring is based not on any imputation of views but rather in retaliation against the spouse of the job applicant, the attack on the job applicant's associational rights is only that much more evident. Of course, a teacher's associational freedom can be compromised in the school setting if outweighed by an appropriate concern of the public employer. See, e.g., Givhan v. Western Line Consolidated School District, 439 U.S.

410, 451 n.4 (1979) (institutional efficiency); Norbeck v. Davenport Community School District, 545 F.2d 63 (8th Cir. 1976), cert. denied, 431 U.S. 917 (1977) (maintaining discipline and coworker harmony); Sullivan, supra (maintaining proper moral and scholastic environment). On the record before us, however, there is no indication that Daniel Cybyske's activities on the neighboring school board would have any impact on his wife's effectiveness as a teacher for the defendant Rosemount-Apple Valley School District.

As to the claimed infringement on freedom of choice in marriage, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit

of happiness * * *." Loving v. Virginia, 388 U.S. 1, 12 (1967). In this case, the defendants' refusal to hire Lynne Cybyske did not deny her the right to marry; it did, however, allegedly discriminate against her because of her particular choice of marital partner. A similar challenge was raised in Keckeisen v. Independent School District 612, 509 F.2d 1061 (8th Cir.), cert. denied, 423 U.S. 833 (1975), where the eighth circuit upheld the validity of a school district's policy of not employing married couples in administrator-teacher situations. Balancing the "right to marriage" claim against the employer's concern to prevent conflicts of interest and favoritism, the eighth circuit concluded the

school district's anti-nepotism rule was not an impermissible infringement on individual constitutional rights. The court noted, however, that "[w]ere the right to marriage claim not so attenuated by the fact that marriage itself is not the subject of the School Board's policy--i.e., were the right more directly involved--then we should perhaps, reach a different result." Id. at 1065. In our case plaintiff's right-to-marriage claim is no more directly involved than it was in Keckeisen, but at the same time the strong offsetting public purpose for the employer's actions, which was present in Keckeisen, is missing here.

What plaintiff is really seeking is a "rights-in-marriage" constitutional

claim. We see no need, the federal constitutional law being as undeveloped as it is, to establish, at least in this case, a new rights-in-marriage claim, and we decline to do so. To the extent there might be any such claim we think it is already merged in the constitutional freedom of association claim which we have here recognized.

Plaintiff-appellant has made a sufficient showing that a genuine factual dispute exists as to whether her husband's activities were a "substantial" or "motivating" factor in her nonhiring by the school board, and at this stage of the proceedings there also appears to be a factual dispute as to whether the school district would not have hired plaintiff even in the absence of her

husband's activities. See Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287 (1977). We hold, therefore, that the trial court erred in granting summary judgment on plaintiff's section 1983 claim for deprivation of her constitutional right of freedom of association.

III.

Since we hold that one of plaintiff-appellant's claims survives defendants' summary judgment motion, that claim returns to the trial court for further proceedings, thus rendering moot appellant's further complaint that summary judgment was premature because her discovery was not completed.

Appellant Lynne Cybyske also claims the trial court committed error in

denying the motion to amend her complaint to add her husband Michael as a party plaintiff to include his claim for infringement of his first amendment rights. Plaintiff delayed over a year after the filing of her complaint, until the eve of defendants' summary judgment motion, to make her motion to amend. Defendants argued lack of timeliness and prejudice in trying all claims together. We cannot say the trial court exceeded its discretion in denying the motion. We observe that Lynne Cybyske tries to bring her husband into the lawsuit by amending her own pleading under Rule 15.01. Her husband did not move to intervene or to be joined as a party, nor is he here on appeal. We do not see how Lynne has standing here to assert

Daniel's claim.

Affirmed in part and reversed in part.

WAHL, Justice (dissenting in part, concurring in part).

I cannot agree that plaintiff Lynne Cybyske does not have a cause of action for marital status discrimination under the Minnesota Human Rights Act. To so hold is to significantly narrow the broad construction we gave "marital status" discrimination in Kraft, Inc. v. State, 284 N.W.2d 386 (Minn. 1979). We recognized in Kraft that "[b]y including marital status within the parameters of the Human Rights Act, the legislature clearly intended to outlaw arbitrary classifications relating to marriage." 284 N.W.2d at 388. We found further

that, in acknowledging the fundamental nature of the marriage relationship in the Act, the legislature intended that an employer may differentiate on the basis of marital status only where a business necessity is compelling and overriding. Id. If, as we determined in Kraft, mere business convenience is an insufficient basis for differentiation, certainly bias against the "pro-teacher" views of one's spouse would be so.

The question is not, as the majority opinion suggests, "whether the 'political status' of one's spouse is protected under our Human Rights Act." The question is whether plaintiff teacher can be denied employment under that act because of the identity and situation of

the man to whom she is married. The New York Court of Appeals chose to interpret marital status narrowly under the New York Human Rights Law by holding that marital status discrimination means only the status of being married, single, separated, divorced or widowed and does not look beyond the individual's conjugal state to embrace the identity or situation of the individual's spouse. In re Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board, 51 N.Y.2d 506, 511, 415 N.E.2d 950, 952, 434 N.Y.S.2d 961, 963 (1980). Thus, State Division of Human Rights ex rel. Howarth v. Village of Spencerport, 76 A.D.2d 50, 434 N.Y.S.2d 52 (1980), relied on by respondents, is irrelevant to our decision here.

In interpreting our own Human Rights Act, we rejected the view that "marital status" does not embrace the identity or situation of one's spouse. Kraft, 284 N.W.2d at 388. The four part-time employee plaintiffs in Kraft were denied full-time employment with that company not just because they were married but precisely because of who their husbands were, in that case, full-time employees of Kraft. We held this to be employment discrimination on the basis of marital status under the Human Rights Act. If, as plaintiff in this case alleges, she was denied employment as a teacher by defendant school district precisely because of who her husband was, a "pro-teacher" school board member in the neighboring district, this constitutes,

under Kraft, employment discrimination on the basis of marital status. Nowhere in Kraft did we limit our holding to anti-nepotism employment policies. We upheld rather the broad prohibition of the Act against arbitrary classification.

We have consistently held that the remedial nature of the Minnesota Human Rights Act requires liberal construction of its terms. See, e.g., City of Minneapolis v. State by Wilson, 310 N.W.2d 485 (Minn. 1981) (holding "race" discrimination included discrimination for association with persons of another race); Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980) (holding "sex" discrimination included employer inaction in face of sexually derogatory sta-

tements and verbal sexual advances directed at one employee by fellow employees); City of Minneapolis v. Richardson, 307 Minn. 80, 239 N.W.2d 197 (1976) (term "discriminate" as used in Human Rights Act means distinction in treatment of individuals based upon irrelevant or impermissible factors). Our continued adherence to a broad construction of "marital status" under the Act is not only required by Kraft but also furthers the Act's objective of encouraging all employers to base employment decisions on the merits of the individual applicant. This construction does not unnecessarily burden employers. An employer may legitimately establish certain requirements for its employees, "bona fide occupa-

tional qualifications," where those requirements are inherently required by the nature of the business. Minn. Stat. § 363.03, subd. 1 (1982).

The plaintiff here has stated a cause of action for marital status discrimination under the Minnesota Human Rights Act as well as for violation of her constitutional rights. I would reverse the grant of summary judgment and remand for trial on both claims.

YETKA, Justice (dissenting).

I join in the dissent of Justice Wahl.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

File No. 93854

Lynne E. Cybyske,

Plaintiff,

vs.

Independent School District No. 196, Rosemount-Apple Valley, Minnesota, Lee Droegemueller, individually and as Superintendent of Independent School District No. 196, Ruth Randall, individually and as Director of Personnel of Independent School District No. 196, and Robert Keeton, individually and as Director of Elementary Education of Independent School District No. 196.

Defendants.

FINDINGS AND ORDER

The above-entitled matter came on for hearing on the Special Term Calendar

before the undersigned at the Dakota County Government Center on November 23rd, 1982. The Plaintiff appeared by and through her attorneys, Mark Wine, Esquire, and Kathleen Hvass Sanberg, Esquire. The Defendants appeared by and through their attorneys, James E. Knutson, Esquire, and Thomas M. Sipkins, Esquire.

Based upon the files and records herein and the arguments of counsel, the Court makes the following:

FINDINGS

1. There are no genuine issues as to any material fact pending in this law suit.

2. That Plaintiff's cause of action, as pleaded, failed to allege actionable marital status discrimination

under either State or Federal law.

3. That Plaintiff's Motion to amend the complaint should be denied.

From the foregoing Findings, the Court makes the following:

ORDER

1. That Plaintiff's claims against the Defendants in the above-entitled matter should be, and hereby are, dismissed.

2. That entry of this order be stayed for thirty (30) days.

DATED: February 25th, 1983

BY THE COURT

George H. Hoey
Acting Judge of
District Court

Office - Supreme Court, U.S.
FILED
OCT 1 1984
ALEXANDER L. STEVAS,
CLERK

(2)

NO. 84-350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INDEPENDENT SCHOOL DISTRICT NO. 196, ROSEMOUNT-APPLE VALLEY, MINNESOTA,

Petitioners,

vs.

LYNNE E. CYBYSKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent, Lynne E. Cybyske, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 347 N.W.2d 256 (Minn. 1984).

REASONS WHY THE WRIT SHOULD BE DENIED

Neither the Decision Below Nor The Record Raises The Questions Presented In The Petition.

The first Question presented in the Petition is whether the Minnesota Supreme Court erred in holding, contrary to *Singleton* v. *Wulff*, 428 U.S. 106 (1976), and its progeny, that Respondent Lynne Cybyske had standing to assert a violation of the Association of Freedom of her non-party spouse. The second Question presented in the Petition is whether Respondent's First Amendment freedom of association includes, vicariously, the political beliefs and associations of her non-party spouse. The Petition for Writ should be denied because these Questions were not determined by the Minnesota Supreme Court, the court below and are, thus, not properly before this Court. *See* Sup. Ct. R. 17.1(b); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Street v. New York*, 394 U.S. 576, 582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1948).

In Part I of its opinion the Minnesota Supreme Court held that Lynne Cybyske did not state a claim for marital status discrimination under the Minnesota Human Rights Act, Minn. Stat. §§363.01-.14 (1982). In Part II of its opinion the Minnesota Supreme Court held that Respondent Lynne Cybyske had stated a cause of action under 42 U.S.C. §1983 against the Petitioner school district and its administrators for infringement of *her* right to freedom of association under the First and Fourteenth Amendments to the United States Constitution.

Contrary to Petitioners' argument, it is clear that Respondent is making a claim only with regard to violation of *her* freedom of association and speech. Further, the Minnesota Supreme Court only considered the case with regard to Petitioner's rights as it stated that "[w]e hold the plaintiff-appellent has, in the current posture of this case, established a constitutional claim sufficient to defeat defendants' motion for summary judgment." *Id.* at 262. The Court then stated that Lynne Cybyske "may prevail if she can establish that the decision of the public employer not to hire her was made because of *her* exercise of constitutionally protected rights and freedoms. . . . The alleged deprivations in this case were to *Lynne Cybyske's* freedom of association and freedom of choice in marriage under the first and fourteenth Amendments." *Id.* (Emphasis added). The Minnesota Supreme Court did not determine whether Lynne Cybyske had standing to assert a violation of the associational freedom of her spouse nor whether her freedom of association included, vicariously, the political beliefs and associations of her non-party spouse. In fact, the Minnesota Supreme Court recognized a standing problem and stated in its refusal to allow Lynne Cybyske's non-party spouse to be joined as a party: "[w]e do not see how Lynne has standing here to assert Daniel's claim." *Id.* at 264. Thus, Petitioners are asking this Court for a decision on an issue about which the Minnesota Supreme Court stated, albeit in dicta, that it would have found in favor of Petitioner-Defendants.

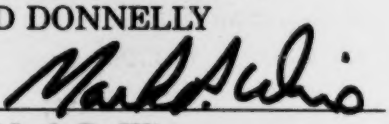
Petitioners' Questions presented in the Petition are, therefore, merely hypothetical questions and are not subject to review by this Court. In the context of the present record, which conclusively shows that Respondent is asserting only violations of *her* constitutional freedoms under the First and Fourteenth Amendments, the questions presented in the Petition could be resolved only by rendering an impermissible advisory opinion.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

OPPENHEIMER WOLFF
FOSTER SHEPARD
AND DONNELLY

By 

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Office-Supreme Court, U.S
FILED
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CLERK

NO. 84-350

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Independent School District No. 196, Rosemount-Apple Valley, Minnesota, et al.,

Petitioners,

vs.

Lynne E. Cybyske,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

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REASONS FOR GRANTING THE PETITION

Although the reasons which Petitioners believe warrant the granting of a writ are adequately stated in the Petition for a Writ of Certiorari, Petitioners believe a brief reply is necessary to correct and comment upon the assertions contained in the Brief in Opposition filed by Respondent.

Respondent alleges that this Court should deny the petition because the questions presented are merely hypothetical and require the rendering of an impermissible advisory opinion (Res. Br. at 2). Petitioners disagree.

Were it true that the issue is whether Lynne Cybyske "may prevail if she can establish that the decision of the public employer not to hire her was made because of her exercise of consti-

tutionally protected rights and freedoms . . ." (Res. Br. at 2; Pet. App. at A-22) (emphasis added), Petitioners might agree that this matter is not subject to review.

Respondent's reading of the Minnesota Supreme Court's decision is transparent, placing form over substance. The language of that court's decision is plain; its ratio decidendi is based exclusively upon the alleged exercise of associational freedoms by Cybyske's non-party spouse which the court imputes to Cybyske as the exercise of hers. It is Daniel Cybyske's membership and known opinions as a member of a neighboring school board, not Respondent's, which concerned the Minnesota Supreme Court (Pet. App. at

A-26). The Minnesota Supreme Court specifically stated:

> Where the public employer discriminates against the job applicant because the employer dislikes the activities of the applicant's spouse, particularly where that spouse is only exercising his or her first amendment rights . . ., it would seem that the job applicant's associational freedoms have been impaired.

Pet. App. at A-26-27; 347 N.W.2d at 262 (Minn. 1984) (emphasis added).

The questions presented by Petitioners specifically address and challenge this ratio decidendi on the basis of standing and unwarranted expansion of the associational freedom as interpreted in previous decisions by this Court.

Incredibly, the Minnesota Supreme Court, in rejecting Respondent's argu-

ment that the "political status" of her spouse is protected under the Minnesota Human Rights Act, stated that to:

> adopt plaintiff's argument would mean that any employer bias or predilection towards a spouse which is imputed to the employee, whether of substance or not, would subject the employer to a lawsuit. We do not think the legislature had this in mind.

Pet. App. at A-18; 347 N.W.2d at 261.

Using the same rationale, however, the Minnesota Supreme Court decided that Lynne Cybyske has stated a constitutional cause of action. Petitioners respectfully submit that the framers of the Constitution, even more than the Legislature of the State of Minnesota, did not have this in mind. The decision of the Minnesota Supreme Court is simply wrong on matters of federal constitu-

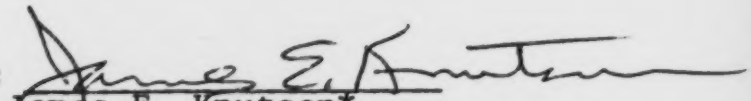
tional importance and should be reversed.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for a Writ of Certiorari, Petitioners request that the Petition be granted.

October 3, 1984

Respectfully submitted,

By: 

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